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No. 97-372

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES SHOE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR *AMICI CURIAE* BOISE CASCADE, ETONIC, INC., GERMAIN-WEBBER LUMBER CO., INTERNATIONAL VENEER CO., MONDIAL INTERNATIONAL CORP. and THE HEIL CO. URGING AFFIRMANCE OF THE JUDGMENT

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INTEREST OF *AMICI CURIAE*

The *amici curiae* are exporters that have paid the "Harbor Maintenance Tax" (hereinafter, HMT) pursuant to 26 U.S.C. §4461 and §4462, upon their exports.

STATEMENT

This brief is submitted on behalf of the *amici curiae* identified on the cover page.[1] This case concerns the propriety of the assessment of the HMT.

In *United States Shoe v. United States*, 114 F.3d 1564 (Fed. Cir. 1997), the court below rendered a decision finding the assessment of HMT on exports prohibited by the United States Constitution, Article 1, Section 9, Clause 5, which provides that: "No Tax or Duty shall be laid on articles exported from any State" (hereafter, the "export clause").

In *United States v. International Business Machines*, __ U.S. __, 116 S.Ct. 1793 (1996), this court held that the export clause prohibited a non-discriminatory tax on freight insurance policies covering goods exported from the United States. This recent affirmation of the limitations that the export clause places on the government is directly applicable to, and controlling of, the question of the constitutionality of the herein involved HMT.

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[1] *Amici curiae* appear with the consent of petitioner and respondent. Additionally, no counsel for any of the parties to this case authored this brief in whole or in part, and no person or entity or their counsel, outside of the *amici curiae*, made any monetary contribution to the preparation or submission of this brief.

Petitioner, in its brief, has couched the issue in this case in terms of whether the HMT is a tax or a "user fee." We do not agree that this is the issue in this case. The export clause is absolute in its terms in that the Government is prohibited from placing any burden upon exports, even if such burden could be labeled a "user fee." Moreover, even if we were to apply the tax/user fee test borrowed from cases dealing with other sections of the Constitution, it is nevertheless clear that the HMT is not a "user fee."

SUMMARY OF ARGUMENT

The assessment of HMT on exports violates the Export Clause because it burdens exports, and is levied during, or at the time of, exportation. The prohibition against taxes on exports also applies to "user fees" which raise federal revenue from exports. The HMT is not a user fee, and it is not saved by the commerce clause.

ARGUMENT

THE HMT ON EXPORTS IS UNCONSTITUTIONAL

A. Introduction

The question in this case is whether the HMT is a tax or duty on exported articles, in violation of Article 1, Section 9, Clause 5, of the United States Constitution. Supreme Court decisions construing the clause establish that a charge or fee is a prohibited tax or duty under the export clause if it is a burden on exports, and it is levied during, or at the time of, exportation. *See Barclay & Co. v. Edwards*, 267 U.S. 451, *petition for reh. den.*, 267 U.S. 442, (1924);

National Paper & Type Co. v. Bowers, 266 U.S. 373, (1924) (Income taxes on income gained from exports was not violative of the export clause even though foreign corporations were exempt from the tax); *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, (1923) (Tax on the sale of all baseball bats and balls was held invalid with regard to exportations since the tax accrued at the time of sale, which in the case of the involved exports, occurred at the time of delivery of the goods to the carrier, or, during the time of exportation); *Thames & M. M. Ins. Co. v. United States*, 237 U.S. 19, (1915) (A tax on marine insurance policies covering exported goods violated the export clause); *United States v. Hvoslef*, 237 U.S. 1, (1915) (Stamp tax on "charter parties" for the exportation of goods to foreign ports was an invalid tax on exports); *Cornell v. Coyne*, 192 U.S. 418, (1904) (Tax on filled cheese did not violate the export clause since the tax accrued at the time of manufacture, and not at the time of exportation); *Fairbank v. United States*, 181 U.S. 283, (1901) (Stamp tax on bills of lading covering merchandise destined for foreign ports was in violation of the export clause); *Turpin v. Burgess*, 117 U.S. 504, (1886) (Charge for stamp to distinguish tobacco products destined for exportation and thereby excluded from a tax levied on domestic tobacco products, was not violative of the export clause); *Pace v. Burgess*, 92 U.S. 372, (1875) (Same statute in question as in *Turpin, supra*, but the tobacco stamp charge was upheld for different reasons).

This Court recently reaffirmed this rule in *International Business Machines ("IBM"), supra*, ("no burden by way of tax or duty can be cast upon the exportation of articles" if the tax is imposed "during the course of exportation"). The HMT is

such a burden and therefore is void with respect to exports. The petitioner's claim in this appeal that the HMT is a permissible "user fee" or is otherwise permitted under the commerce clause is erroneous. The export clause prohibits the government from regulating commerce through export taxes, or from collecting any revenue from exports, regardless of how denominated. Furthermore, the HMT is not a "user fee."

B. The HMT Is A Burden On Exports.

Central to the question of whether a given act of Congress imposing a fee or charge upon exports is in violation of the export clause, is the question of whether such fee or charge imposes a burden upon exports. In *Fairbank, supra,* the Court stated that [181 U.S. at 290]:

> The requirement of the Constitution is that exports should be free from any governmental burden....It is a restriction on the power of Congress....[which] should be enforced in accordance with its letter and spirit.

The Court continued [181 U.S. at 292-3]:

> [T]he purpose of the restriction is that exportation, all exportation, shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose

> of revenue" but the motion was voted down. **So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports.**

See also United States v. Hvoslef, supra, 237 U.S. at 13; *IBM, supra,* 116 S. Ct. at 1797 ("The requirement of the Constitution is that exports should be free from *any* governmental burden," quoting *Fairbank*) (emphasis added).

The significance of the intent of the drafters of the Constitution to prohibit the placement of any governmental burden upon exports is not lost in the current era. It is common knowledge that the United States suffers a negative balance of payments with regard to international trade in goods and services. *See, e.g.,* Bureau of Economic Analysis, *Data From The Balance of Payments Accounts* (last modified Dec. 10, 1997) <http://www.bea.doc.gov/briefrm/curracct.htm; *U.S. International Trade In Goods and Services:* October 1997 <http://www. bea.doc.gov/bea/newsrel/trade1097.txt. Unquestionably the assessment of the HMT make U.S. exports more expensive and therefore less competitive in the international market place, which, if anything, exacerbates the balance of payment problem.

It is thus apparent that *any* burden on exports -- in the form of an expense that is imposed by the government and that is added to the cost of exporting merchandise -- is prohibited by the export clause,

whether one chooses to label such burden a tax, duty, or "user fee." If the tax causes the exporter to incur costs that make his or her products less competitive in the international market place, then the tax is prohibited under the Constitution.

C. Even Though The HMT Is Applicable To All Cargo And Passenger Service, It Is Invalid As To Exports Because It is Levied During Or At The Time Of Exportation.

The fact that the HMT is applicable to the movement of all cargo and passenger ship service does not render the tax valid as to exports. The fact remains that the HMT is assessed on exported goods during or at the time of exportation, and is invalid.

In *A.G. Spalding, supra*, the Court determined that the questioned tax was invalid as to the exportation of baseball bats and balls, even though the same tax was equally applied to domestically distributed merchandise. The point was that under the statutory scheme, the tax accrued at the time that the merchandise was sold, which in the case of exports, occurred at the time that the goods were delivered to the carrier. As such, the tax accrued *during* exportation, which rendered it invalid under the export clause. As stated by the Court [262 U.S. at 69]:

> The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant [the Tax Collector] if

> in this case the tax was "laid on articles exported from any State", because that is forbidden in terms by the Constitution, Article I, § 9....

In *IBM, supra*, the Court reaffirmed this principle of *A.G. Spalding*, holding, "the Export Clause does not permit assessment of nondiscriminatory federal taxes on goods in export transit." 116 S. Ct. at 1804. Citing *A.G. Spalding*, the *IBM* Court made clear that a tax is invalid if "the taxable event ... occurred at the moment the goods entered the course of exportation." 116 S.Ct. at 1798.

Unquestionably, the HMT is a tax on the act of exportation, in which the taxable event occurs when (or after) the goods enter the course of exportation. In the case of exports, the HMT is imposed "at the time of loading" of the cargo on a vessel bound for exportation. 26 U.S.C. §4461(c)(2)(A). It is difficult to imagine a tax occurring any further in the course of exportation without the goods having exited the country. Moreover, it is of no moment that the same tax is also applicable to imports, passenger vessels and domestic cargo movements.

D. The Prohibition Of The Export Clause Also Applies To "User Fees".

In this appeal, petitioner claims that the HMT is not a tax at all but rather a "user fee," exacted by the federal government to cover some of the costs of maintaining the nation's harbors. While in some tax schemes an otherwise prohibited tax may be valid if it is earmarked to provide a certain benefit or service to the taxpayer, a tax in the guise of a user fee does

not survive the explicit prohibition of the export clause. The cases are clear that *all* burdens on exports are prohibited, whether they are for general revenue purposes or they are designed to provide funding for specific projects.

The prohibition of the assessment of any tax or fee on exports is absolute. As noted in the relevant portion from the above quoted materials in the *Fairbank* case [181 U.S. at 292-3]:

> This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue" but the motion was voted down.

Thus, it is of no moment that the tax upon exports is "for the purpose of revenue", or for some other purpose. It was the clear intent of the framers of the Constitution that *all* taxes and duties upon exports be prohibited. We have found no Supreme Court case in which an *ad valorem* assessment on exports, exacted at the time of exportation, was held to be a permissible user fee not barred by the export clause.

The case of *Pace v. Burgess, supra*, could be improperly cited for the proposition that user fee assessments do not violate the prohibition of the export clause. However, upon careful analysis of this case, it is evident that the fee in question therein was upheld on very different grounds. In fact, the fee aided in the export of the involved goods. In finding that the stamp fee at issue did not contravene the

export clause, the Court stated, in relevant part, that [92 U.S. at 375-6]:

> The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked.
>
> * * * *
>
> A stamp may be used, and, in the case before us, we think it is used, for quite a different purpose from that of imposing a tax or duty: indeed, it is used for the very contrary purpose, -- that of securing exemption from the tax or duty.

Thus, the stamp fee was not a "user fee" regarding exports. Rather, it was a fee which exempted the exporter from the payment of a tax that would have otherwise accrued had the goods not been affixed with a stamp. Any doubt as to the true holding in *Pace* was settled by this Court in *IBM*, where it stated, "we upheld the charge [in *Pace*] on the basis that the stamps were designed to prevent fraud in the export exemption from the excise tax and did not, therefore, represent a tax on exports." 116 S. Ct. at 1796.

The HMT here in question does not involve the payment of a small fee for the privilege of exemption from a far greater tax. The HMT is a tax upon exported goods, pure and simple. Even if the HMT collected is destined for the special purpose of maintaining and improving certain harbor facilities, it is, nevertheless, a tax on exports, prohibited by the export clause.

E. The HMT Is Not a "User Fee".

Where user fees have withstood scrutiny by the Supreme Court, the constitutional provision in question was other than the export clause. Thus, while the characterization of the HMT as a user fee would not, as shown above, have any significance with regard to whether the HMT is violative of the export clause, the HMT is not in fact a user fee.

The basis of petitioner's user fee theory was summarized by the dissenting judge in the court below who stated that : "In sum, it surely does not violate Congress' intent to construe the HMT as a user fee" (Pet. App. 37a). The thrust of petitioner's argument is that the HMT is a "user fee" because the legislative history to the Act indicates that Congress intended it to be a "user fee," (notwithstanding the fact that the Act itself refers to the assessment as a "tax"). Yet intention cannot take the place of reality. The tax is imposed on an *ad valorem* basis which has no nexus to the harbor maintenance services provided. The tax is imposed upon exporters who are not the direct recipients of the services provided. Moreover, the ever growing surplus of funds in the Harbor Maintenance Trust Fund establishes that the exporters are being taxed far beyond the expenditures

required to maintain the harbors. In short, the realistic facts show that the HMT is not a user fee, notwithstanding the intendment of the drafters of the Act.

The government's case relies heavily on the fact that the HMT assessments are paid into a trust fund, and can be expended for maintenance of the nation's harbors. Petitioner argues that the HMT does not raise revenue for general welfare, and therefore is not a "tax" but is rather a user fee. The contention is illogical for several reasons. First, the proceeds of the HMT are revenue, albeit revenue collected for a specific purpose. In *IBM*, the Court bluntly decreed that the export clause "disallows *any* attempt to raise federal revenue from exports." 116 S. Ct. at 1802 (emphasis added).

Second, the HMT does not merely fund discreet services provided to the individual taxpayer, such as wharfage, pilotage or the like. Rather, the HMT revenue is earmarked for spending on federal projects that benefit the general welfare to a similar extent as other federal programs that are funded by Congress through specific allocations. The maintenance of navigable channels in our nation's harbors is essential to the ability of the nation to engage in international commerce. Maintaining the ports which make possible exportation can hardly be viewed as an exclusive service to shippers, but rather is an essential endeavor which undoubtedly benefits the general welfare. One must bear in mind that the manufacturers of goods sold for export, their employees, the banks financing export sales, the entire U.S. maritime industry, and others all depend upon properly maintained harbors. The HMT is truly

a tax, the revenue of which is expended for general welfare.

The Supreme Court warned of attempts to disguise an otherwise prohibited tax on exports as a user fee. As stated in *Pace v. Burgess, supra*, 92 U.S. at 376: "The point to guard against is, the imposition of a duty under the pretext of fixing a fee." In theory, it is possible to craft most any tax statute as a "user fee" by the simple expediency of earmarking the proceeds thereof for a specific purpose. That is the situation here with respect to the HMT.

CONCLUSION

For the foregoing reasons, the decision and judgment below should be affirmed.

Respectfully submitted,

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